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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

DEAN E. JORDAN - Petitioner

vs.

DON A. FENDON - Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ARIZONA

DEAN E. JORDAN, In Pro Se
P. O. Box 87
Yucca, AZ 86438-0087
(520) 766-2347

29pp

QUESTIONS PRESENTED FOR REVIEW

Was the Petitioner denied his U. S. Constitutional Seventh Amendment right to a jury trial in an Arizona Superior Court trial where the claim was for common law fraud for more than twenty dollars, there was a conflict between the affidavit of the Defendant and circumstantial evidence and summary judgment was granted to the Defendant under Arizona Rules of Civil Procedure, Rule 56(b)?

Was the Petitioner denied the equal protection of the law under the Fourteenth Amendment to the U. S. Constitution, and Arizona Constitution, Article II, Section 3, as applied, where the trial court effectively established a privileged class of persons, i.e. attorneys?

LIST OF PARTIES

All parties to the judgment and decisions appear in the case caption.

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U. S. CONSTITUTIONAL PROVISIONS

U. S. Constitution, Amendment VII, In suits at common law, where the value in controversy, shall exceed twenty dollars, the right of trial by jury shall be preserved, ...

U. S. Constitution, Amendment XIV, Section 1, in part: No state shall ... deny to any person within its jurisdiction the equal protection of the law.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The undersigned Petitioner respectfully prays that a writ of certiorari issue.

OPINIONS BELOW

The order of the Supreme Court of the State of Arizona denying a Petition for Review is in the Appenix at A. The decision and order of the Arizona Court of Appeals denying the appeal is in the Appendice at B. The judgment of the Superior Court of the State of Arizona in and for Maricopa County is in the Appendice at C.

JURISDICTION

The jurisdiction of this court is invoked under 28 U. S. C. section 1257(a).

STATEMENT OF THE CASE

Prior to 1991, the Petitioner was injured during the course of his employment and he sought workers' compensation for disability and medical coverage. He eventually retained Don A. Fendon as his counsel in a claim against the compensation carrier, State Compensation Fund.

In a letter dated April 1, 1991, from the Respondent, in the Appendix at D, provides in part:

> Mr. Kirk A. Barberich, the attorney for the State Compensation Fund, has authorized a myelogram and a dye-enhance CT scan to be performed under the auspices of Dr. Kalid
>
> We have contacted Cindy in Dr. Aslam's office and she has made the arrangements for you. The studies in question are scheduled for Thursday, April 11 at 11:00 A.M. at the Kingman Regional Medical Center. ... .

The studies in question were performed with the Petitioner relying upon his attorney's written representation that they had been authorized by the State Compensation Fund. The test established damages, but not the time of injury; and the State Compensation Fund refused to pay for the tests. The Petitioner brought suit against the State Compensation Fund for payment of the costs of the purportedly authorized exams. They responded with a summary judgment motion and an affidavit of Kirk A. Barberich, at Appendix E, that provides in part as follows:

> I never authorized or agreed to pay for the medical bills at issue. There are no notes or other correspondence in my file indicating that I ever authorized payment of the medical bills at issue. There is no correspondence written to me by Mr. Jordan's previous attorney, Don Fendon, indicating that I agreed to pay for the medical bills at issue.

The Petitioner lost the action against the State Compensation Fund on the summary judgment motion because he had no evidence to support his claim, except the letter to him from the Respondent.

Suit was then brought against the Respondent for common law fraud where the amount in controversy was in excess of twenty dollars ($20.00 U.S.)

The Defendant submitted his answer and his affidavit, at Appendix F, which provided in part as follows:

> (Referring also to Dr. Aslam's unauthenticated medical records) From review of those two documents, I am able to reconstruct that Mr. Kirk A. Barberich, or someone from his office, contacted Dr. Aslam's office and that he authorized the testing, that Dr. Aslam's office contacted my office to inform me that the tests had been authorized by Mr. Barberich and when those test would be conducted, and that I passed that information along to Plaintiff Jordan in my letter dated April 1, 1991.

The Respondent's affidavit also provided 'Although I have no independent recollection of my conversation with Mr. Barberich or Dr. Aslam's office concerning authorization ... ', then words to the effect that it is not my practice or custom to inform clients of medical authorization until received and 'I have never knowingly and intentionally mislead Dean Jordan ... in connection with a Worker's Compensation claim.' Summary judgment was granted for the Defendant/Respondent pursuant to Arizona Rules of Civil Procedure, Rule 56(b).

The undersigned appealed to the Arizona Court of Appeals. They ruled for the Defendant holding if the facts produced in support of the claim ... have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the advanced conclusion, then summary judgment should be affirmed. *Orme School v. Reeves*, 166 Ariz. 301, 309-10, 802 P.2d 1000, 1008-09.

ARGUMENT

The Respondent has not denied that injury resulted to the Petitioner as a result of the non-payment of the medical bills or that he had the potential to benefit financially if the medical evidence obtained by the tests substantiated the extent and time of Plaintiff/Claimant's injuries. As a result of the trail court's granting the summary judgment motion for the Defendant, the Petitioner was denied his right to a jury trial and a jury was denied the opportunity to weigh the credibility of the Defendants testimony.

Where the attorney for the State Compensation Fund denied ever agreeing to pay for the medical bills in question and the Respondent stood, potentially, to gain form having the tests performed and knew they could become the liability of the Petitioner if the State Fund did not pay for them, reasonably prudent jurors could have decided that the Defendant knowingly misrepresented to the

Petitioner, and to Dr. Aslam's office that the State Compensation Fund had agreed to pay, with intentional disregard of the consequences to the Petitioner in the hope the exams demonstrated the hope for prognosis.

The U. S. Constitution, Amendment VII, provides:

> In suits at common law, where the value in controversy, shall exceed twenty dollars, the right of trial by jury shall be preserved, ...

There was a controversy between the Defendant's affidavit and that of attorney Barberich; there was an inconsistency between the Defendant's affidavit and the letter the Defendant wrote to the Petitioner. It is a matter, according to the Constitution, for the jury to decide what to believe. By ruling for the Defendant, the Petitioner's constitutional right to a jury trial was denied.

Arizona Constitution, Article II, Section 23, is similar to the U. S. Constitution's Seventh Amendment. ... it is applicable only in those actions

that existed at common law when the Arizona Constitution was adopted in 1910. *Life Investors Ins. Co. v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 532, 898 P.2d 478, 481 (1995). Arizona Constitution, Article II, Section 3, makes the U. S. Constitution the supreme law of the land. Therefore, the Petitioner's constitutional rights were violated directly and indirectly.

In this action, the courts established a privileged class, i.e. 'attorney', and held the Petitioner to proof, some verbal or other unknown evidence demonstrating Respondent's knowledge of his intent to defraud and knowledge of the falsity of his statements while it accepted the Respondent's lack of personal recollection of facts of the case couple with his generalized statement that he never intended to mislead or defraud.

The U. S. Constitution Amendment XIV, Section 1, provides, in part, No State shall ... deny to any person

within its jurisdiction the equal protection of the law. While this is usually related to action by some area of the executive branches of government, here it is action by the judicial system of the State of Arizona that resulted in the denial of the equal protection of the law to the Petitioner.

Admittedly, this case is not of the economic significance of potential antitrust or other possible anti-competitive practices of Microsoft or the nature and/or extent of the exercise of the executive privilege by William Jefferson Clinton. However, the Constitution is for all of the people.

There was clearly circumstantial evidence from which a jury could have determined that either Respondent knew he was lying in his letter to the Petitioner or that he had no factual basis whatsoever in making the statements; under those circumstances, that he acted in an intentional disregard of the Plaintiff's property

interest, i.e. fraudulently.

In taking such actions when a summary judgment motion is pending the courts have denied the constitutional right to a jury trial in such a case. By stretching for the Defendant and holding the Petitioner to a higher standard, the judicial system of the State of Arizona has denied the Petitioner the equal protection of the law.

CONCLUSION

Based upon the foregoing, the Petitioner prays that a Writ of Certiorari issue.

Respectfully submitted.

Dean E Jordan

DEAN E. JORDAN
P. O. Box 87
Yucca, AZ 86438-0087
In Pro Se

APPENDIX TO WRIT OF CERTIORARI

Appendice A Order of the Arizona Supreme Court denying a Petition for Review of the Decision of the Arizona Court of Appeals. Page 12

Appendice B Opinion of the Arizona Court of Appeals denying the appeal. Page 13

Appendice C Judgment of the Superior Court of the State of Arizona in and for the County of Maricopa. Page 17

Appendice D Letter, dated April 1, 1991, from the Respondent to the Petitioner. Page 19

Appendice E Affidavit of Attorney Barberich. Page 20

Appendice F Affidavit of Respondent. Page 21

APPENDICE A

SUPREME COURT

NOEL K. DESSAINT STATE OF ARIZONA KATHLEEN E. KEMPLEY
CLERK OF COURT CHIEF DEPUTY CLERK
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE (602) 542-9396

December 19, 1997

RE:DEAN E. JORDAN vs. DON A. FENDON/WISNIEWSKI&FENDON
Supreme Court No. CV-97-0421-PR/A
Court of Appeals No. 1 CA-CV 97-0040A
Maricopa County No. CV 95-20713

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 16, 1997, in regard to the above-referenced cause:

ORDERED: Petition for Review by the Supreme Court of a Decision of the Court of Appeals = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 19th day of December, 1997.

NOEL K. DESSAINT
TO:
Dean E. Jordan, Pro Se
Jeffrey A. King, Esq., Sorenson Moore Evans Marshall & Rocco PLLC
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix
Lexis-Nexis
West Publishing Company
ldo

APPENDICE B

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
(STAMPED)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FILED
JUL 22 1997
GLEN D. CLARK, CLERK
By: /s/_____

DEAN E. JORDAN, Plaintiff-Appellant, v. DON A. FENDON; WISNIEWSKI & FENDON, a professional corporation, Defendant-Appellees.	1 CA-CV 97-0040A DEPARTMENT D DECISION ORDER (Not for Publication - Rule 29, Arizona Rules of Civil Appellate Procedure)

Appeal for the Superior Court of Maricopa County.

Cause No. CV 95-20713
The Honorable Colin Campbell, Judge
AFFIRMED

Sorenson Moore Evans Marshall & Rocco
By Jeffrey A. King
Attorneys for Defendants-Appellees Phoenix
Dean E. Jordan
In Propria Persona Yucca

Pursuant to Rule 29, Arizona Rules of Civil Appellate Procedure, Presiding Judge Michael D. Ryan and Judges Sheldon H. Weisberg and Jon W. Thompson have considered this accelerated appeal at conference, and now issue this decision. Dean E. Jordan (plaintiff) appeals the trial court's entry of judgment in favor of Don A. Fendon (defendant). We affirm.

In 1991, defendant, an attorney, represented plaintiff in a worker's compensation matter. During the course of that representation, defendant sent plaintiff a letter stating that the state compensation fund had approved, and plaintiff was scheduled _/_ to undergo, certain medical tests at a local hospital. Plaintiff reported to the hospital as scheduled and the tests were preformed. The state compensation fund later denied that it had authorized the tests and consequently refused to pay for them. The hospital sought payment from the plaintiff, who also refused to pay the the bill. Collection proceedings were instituted against the plaintiff.

Plaintiff then brought this action, alleging that defendant had committed fraud upon the plaintiff by lying when he wrote that the medical tests had been approved. Plaintiff sought both compensatory and punitive damages.

In order to show fraud, plaintiff was required to proved by clear and convincing evidence: 1) a representation by the defendant, 2) its falsity, 3) its materiality, 4) that the defendant knew it was false, 5) that the defendant intended that the plaintiff act upon it, 6) that the plaintiff did not know it was false, 7) plaintiff's reliance on the truth of the representation, 8) plaintiff's right to rely upon the representation, and 9) plaintiff's consequent injury. *Schmidt v. Mel Clayton Ford,* 124 Ariz. 65, 67. 601 P.2d 1349, 1351 (App. 1979).

Defendant moved for summary judgment arguing, among other things, that the plaintiff could not prove his fraud claim. He submitted an affidavit stating that he had reviewed the doctor's records and found and entry to the effect that the compensation fund attorney had called and authorized the test for plaintiff.

He also stated:

> Although I have no independent recollection of my conversation with the (compensation fund attorney _/_ or the doctor performing the tests,) concerning authorization for the aforementioned medical procedures for (plaintiff), it is my custom and practice not to inform a client, (either) orally or in writing, the State Compensation Fund has authorized a given medical procedure unless I have been specifically told that the procedure has been authorized. I have never intentionally and knowingly misled (plaintiff) or any other client of mine concerning the State Compensation Fund's agreement to authorize a specific medical procedure in connection with a Worker's Compensation Claim.

In response, plaintiff produced a copy of a letter from defendant and an affidavit from the attorney who handled his claim for the state compensation fund stating that the fund attorney "never authorized or agreed to pay for the medical bills at issue." He also produce his own affidavit stating that he had undergone the tests according to the defendant's instructions and that he was now being held liable for the costs. He argued that "under those circumstances, there is no doubt that (defendant) knew the statement he made to the Plaintiff was false."

The trial court granted defendant's motion finding that:

> the facts produced in support of the plaintiff's claim have so little probative value given the quantum of evidence required . . . that reasonable people could not agree with the conclusion advanced by the plaintiff.

Plaintiff now appeals and argues that the trial court improperly resolved conflicts in the evidence in defendant's favor and erred in granting summary judgment. We disagree.

In reviewing a grant of summary judgment, we must view the evidence in the light most favorable to the non-moving party, drawing all justifiable inferences in his favor. *See. Orme School / v. Reeves.* 166 Ariz. 301, 309-10, 802 P.2d 1000. 1008-09 (1990). Notwithstanding, "if the facts produced in support of the claim ... have so little probative value, given the quantum of evidence required, that reasonable people could not agree" with the advance conclusion, then summary judgment should be affirmed. *Id* at 309, 802 P.2d 1008.

In this appeal, plaintiff badly argues, as he did in the trial court, that "the only conclusion is that (defendant) knew his statements were false when he made it." He has, however, presented no *evidence* that the defendant knew the falsity of his statement that the tests were authorized by the state compensation fund. At most, defendant has shown a miscommunication between defendant and the compensation fund attorney, or perhaps even malpractice. But the fact that the defendant may have actually been wrong about the authorization has no bearing upon whether he knew that he was wrong. We therefore agree with the trial court that the plaintiff's evidence has "so little probative value" that "reasonable people could not agree" that the defendant committed fraud.

The judgment of the trail court is affirmed.

DATED July 22, 1997.

/s/ Sheldon H. Weisberg
Sheldon H. Weisberg

APPENDICE C

Jeffrey a. King # 011561
SORENSON, MOORE EVANS MARSHALL
& ROCCO
1144 East Jefferson
Phoenix, Arizona 85034
(602) 254-6044

Attorneys for Defendant Don A. Fendon

Judgment filed December 11, 1996

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

DEAN E. JORDAN, Plaintiff, v. DON A. FENDON; WISNIEWSKI & FENDON, A Professional Corp., Defendants.	No. CV 95-20713 **JUDGMENT** (Assigned to the Honorable Gregory Martin)

This matter having come before the Court on Defendant's motion for summary judgment and upon Plaintiff's cross-motion for partial summary judgment, and the Court having considered the entire record in this action and having heard the oral arguments of the parties, and being fully advised in the premises, finds that no genuine issue of material fact exists as to Defendant Fendon's liability to the Plaintiff, and that Defendant Fendon is entitled to judgment as a mater of law on all claims herein and further that Plaintiff is not entitled to judgment on any of his claims herein, and good cause appearing therefor;

IT IS HEREBY ORDERED that Defendant Fendon's motion for Summary Judgment is granted and that Plaintiff's cross-motion is denied, that Defendant Fendon shall have a judgment against Plaintiff on Plaintiff's complaint herein, that Plaintiff's complaint

and this action be dismissed with prejudice, and that Plaintiff shall take nothing from Defendant Fendon by this action. _/_

IT IS FURTHER ORDERED that Defendant shall have and recover from Plaintiff taxable costs incurred herein in the amount of fifty seven and no/100 dollars ($57.00), plus interest thereon at the rate of ten percent (10%) per annum from the date of this judgment until paid in full.

DONE IN OPEN COURT this 7'th day of November, 1996

/s/ JUDGE COLIN CAMPBELL
Judge of the Superior Court

ORIGINAL lodged this 7'th day of October, 1996, with:

The Honorable Gregory Martin
201 W. Jefferson, Suite 8C
Phoenix, AZ 85003

and copy mailed to:

Dean E. Jordan
P. O. Box 87
Yucca, AZ 86438
Plaintiff, Pro Per

/s/Jeffrey A. King

APPENDICE D

WISNIEWSKI
& FENDON

GREAT AMERICAN TOWER
3200 N. CENTRAL
AVE. SUITE 1550
PHOENIX, ARIZONA 85012-2435

A PROFESSIONAL CORPORATION (602) 234-3700
ATTORNEYS AT LAW Fax (602) 230-7579
(INFORMATION REGARDING ATTORNEYS DELETED

April 1, 1991

Mr. Dean Jordan
P.O.Box 87
Yucca, AZ 86438

Dear Mr. Jordan:

Mr. Kirk A. Barberich, the attorney for the State Compensation Fund, has authorized a myelogram and a dye-enhanced CT scan for you to be performed under the auspices of Khalid Aslam, M.D..

We have contacted Cindy in Dr. Aslam's office and she has made the arrangements for you. The studies in question are scheduled for Thursday, April 11 at 11:00 a.m. at the Kingman Regional Medical Center. However, Cindy advised us that you need to check into the hospital at 8:00 a.m.

Finally, you will need to plan on spending the night in a hospital holding bed at the hospital.

Please call Carole upon receipt of this letter to confirm that you will appear for these studies.

Thank you for your courtesy and consideration regarding this matter.

Very truly yours,
/s/Don A. Fendon
Don A. Fendon
For the Firm

APPENDICE E

Kirk Barberich
STATE COMPENSATION FUND
3031 N. 2nd Street
Phoenix, Arizona 85012
631-2157
State Bar No: 011386

SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF MARICOPA

DEAN E. JORDAN Plaintiff, v. STATE COMPENSATION FUND, Defendant.	) Case No. 94-20596)) DEFENDANT'S) AFFIDAVIT)))

My name is Kirk Barberich. I am an attorney employed by the State Compensation Fund. In 1991, I defendant a case on behalf of the State Compensation Fund and Jorinex Exploration and Mining Co.

I never authorized or agreed to pay for the medical bills at issue. There are no notes or other correspondence in my file indicating that I ever authorized the payment of the medical bills at issue. There is no correspondence written to me by Mr. Jordan's previous lawyer, Don Fendon, indicating that I agreed to pay for the medical bills at issue.

/s/ Kirk A. Barberich
KIRK A. BARBERICH
Attorney for Defendant

(NOTARY INFORMATION)

APPENDICE F

Jeffrey A. King #011561
SORENSON, MOORE, EVANS, MARSHALL & ROCCO
1144 East Jefferson
Phoenix, Arizona 85034
(602) 254-6044

Attorney for Defendant Don A. Fendon

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DEAN E. JORDAN, Plaintiff, v. DON A. FENDON; WISNIEWSKI & FENDON, A Professional Corp., Defendants.	No. CV 95-20713 AFFIDAVIT OF DON A. FENDON (Assigned to The Honorable Kathleen L. Wieneke, Pro Tem for Honorable [illegible]

STATE OF ARIZONA)
) ss.
County of Maricopa)

DON A. FENDON, being first duly sworn upon his oath, hereby disposes and states that:

1. I am one of the named Defendants in the above captioned and above-numbered action. I have personal knowledge of the matters stated herein and give this affidavit in support on my pending motion for summary judgment in the above-captioned action.

2. I am a certified specialist in Workers' Compensation. I represented Plaintiff Dean Jordan in connection with a Worker's Compensation claim in 1991. I authored the letter addressed to Mr. Jordan, dated April 1, 1991, attached to Plaintiff's complaint, in which letter I state, "Mr. Kirk A. Barberich, the attorney for the State Compensation Fund, has authorized a myelogram and a dye-/enhanced CT scan for you to be performed under the auspices of Khalid Aslam, M.D."

3. I have reviewed the aforementioned letter. I have also reviewed a copy of a portion of Dr. Khalid Aslam's medical records pertaining to Plaintiff Jordan. Dr. Aslam's notes contain an entry that appears to be dated 3/29/91 and which states:

> Per Kirk Barberich - St. Comp. general legal (telephone number deleted); ok for investigative testing. Sched. 4/11/91 11:00 a.m. Atty Don Fendon notified (telephone number omitted). He will notify Mr. Jordan.

From my review of these two documents, I am able to reconstruct that Kirk Barberich, or someone from his office, contacted Dr. Aslam's office directly to inform Dr. Aslam that he had authorized the testing, that Dr. Aslam's office contacted my office to inform me that the tests had been authorized by Mr. Barberich and when those tests would be conducted, and that I then [passed that information along to Plaintiff Jordan in my letter dated April 1, 1991.

This reconstruction is consistent with my many years of Worker's Compensation experience, in which I have found that it is a virtually universal practice for medical providers not to perform procedures unless and until they have received authorization directly for the Worker's Compensation carrier.

4. Although I have no independent recollection of my conversation with Mr. Barberich or Dr. Aslam's office concerning authorization for the aforementioned medical procedures for Mr. Jordan, it is my custom and practice not to inform a client, orally or in writing, that the State Compensation Fund has authorized a given medical procedure unless I have been / specifically told that the procedure has been authorized. I have never intentionally and knowingly mislead Dean Jordan or any other client of mine concerning the State Compensation Find's agreement to authorize a specific medical procedure in connection with a Worker's Compensation Claim.

5. Based upon my custom and practice, my review of the aforementioned documents, and my knowledge that I have never intentionally and knowingly misled a client concerning State Compensation Fund authorization for medical procedures, it is my testimony that Mr. Barberich specifically authorized the two medical

procedures described in my April 1, 1991 letter to Mr. Jordan and that my letter to Mr. Jordan was accurate as of the date it was written.

6. My April 1, 1991 letter to Dean Jordan does not contain any representation which I knew then or believe now to be false, and I did not intend to defraud Mr. Jordan in any way.

7. My representation of Plaintiff Jordan in connection with his Worker's Compensation claim ended shortly after my April 1, 1991 letter was sent to him. I was not aware of the problem concerning payment for Plaintiff Jordan's medical test until the Fall of 1995. Had I known sooner that the State Compensation Fund had reneged on its agreement to pay for Mr. Jordan's medical tests, I would have requested an investigation and hearing before the Industrial Commission pursuant to A.R.S. section 23-1061(j) In my opinion, Mr. Jordan is still entitled request an investigation and hearing pursuant to that statute with respect to these unpaid medical bills on his Worker's Compensation claim. _/_

AFFIANT FURTHER SAITH NAUGHT

DATED this 27 day of August, 1996

/s/ Don A. Fendon
DON A. FENDON

(NOTARY INFORMATION OMITTRED)
(STATEMENT OF SERVICE OMITTED)